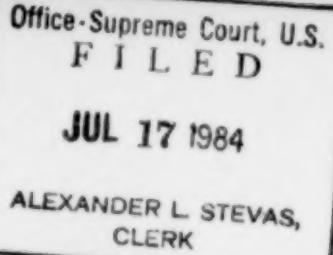


No. 83-2004



IN THE

Supreme Court of the United States

October Term, 1983

MATSUSHITA ELECTRIC INDUSTRIAL
CO., LTD., et al.,

Petitioners

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

SUPPLEMENTAL BRIEF OF RESPONDENTS

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On July 6, 1984, the same day respondents' brief in opposition was filed, the Government of Japan filed a motion for leave to file a brief *amicus curiae* and brief *amicus curiae* in support of the petition for a writ of certiorari. Such a motion is not favored. (Rule 36.1). However, Rule 36.1 allows no time and makes no provision for filing "an objection concisely stating the reasons for withholding consent" (*cf.* Rule 36.3), where the motion and brief support the petition but are filed simultaneously with the brief in opposition. The respondents accordingly file this supplemental brief (Rule 22.6) to explain their reasons for

withholding consent and their views on the substantive arguments advanced by the Government of Japan.¹

The Government of Japan, like the petitioners, misinterprets the decision of the Third Circuit and extracts therefrom issues that are not properly before this Court. There is simply no reason to permit such an *amicus* brief to be filed, nor do the arguments advanced in that brief justify granting certiorari "in order that the contents of the 1975 Statement of the Government of Japan and the attached Note Verbale [dated May 29, 1984] may be given proper consideration." (Brief at 6).² Such "proper consideration" may be given here and now.

1. The Government of Japan asserts that the court below "disregarded the Japanese Government's Statement" and "questioned whether the export agreements and regulations in fact originated with the Japanese Government." (Brief at 2). From this, it is lamely suggested that the court below determined "*in effect*" that conduct "within Japanese territory pursuant to the direction of the Japanese Gov-

1. A similar motion and brief *amici curiae* to which respondents did not give consent were filed July 7 by the American Association of Exporters and Importers and Consumers for World Trade. Those *amici* address an issue not before the Court for reasons stated in the Brief in Opposition. Moreover, those *amici* overlook this Court's holding in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), that agreements having the purpose or effect of depressing price levels are *per se* unlawful.

2. There is a serious question whether the Note Verbale of May 29, 1984, which was not introduced into the record before the Court of Appeals or before the district court is properly before this Court. There is also a serious question whether this Court can take judicial notice of such a non-record statement by the Embassy of Japan to the State Department. The Government of Japan asserts no authority to support its effort to inject that note into judicial consideration in this fashion. Moreover, the belated attempt to rewrite the April 1975 note in the May 29, 1984 note under the pretext of "reaffirming" the 1975 note is an improper attempt to intrude into the judicial processes of the United States.

ernment . . . may constitute a violation of the United States antitrust laws." (*Id.*).

These suggestions are simply incorrect. In its opinion, the Court of Appeals specifically acknowledged the claim made below by petitioner, Mitsubishi Electric Corporation, that the Japanese Ministry of International Trade and Industry ("MITI") "mandated" certain export cartel agreements to which the petitioning Japanese manufacturers and trading companies became parties. (177a-178a; 188a). For the reasons it stated, however, the court below found it unnecessary to address any of the legal and factual issues involving the content of the so-called "MITI note." Instead, the Court of Appeals *assumed, without deciding*, that a "government-mandated export cartel fixing minimum prices would be outside the ambit of Section 1 of the Sherman Act." (188a). The court below never "questioned" the content of the "MITI note" and never questioned whether the export agreements and regulations "originated with" MITI, although the court below did specifically state that there were genuine issues of fact concerning other aspects of petitioners' conduct that precluded summary judgment. The Court of Appeals' decision did not contradict any assertion contained in the MITI note which had been sent to the district court in April 1975. In view of these misperceptions of the Court of Appeals' decision, the questions the Government of Japan attempts to raise by its motion cannot properly be brought before the Court in this case.

2. The Government of Japan suggests that this case involves only "the activity of its own nationals within its territory." (Brief at 5). This also is incorrect. In an extensive opinion filed by the Honorable A. Leon Higginbotham, then the district court judge to whom these cases were assigned, the petitioning Japanese companies were held to be present in the United States, transacting business here and availing themselves of the protection of the laws of the United States. 402 F.Supp. 262 (E.D.Pa. 1975). The Petition does not even attempt to question that finding. Peti-

tioners' single course of conduct transcended actions undertaken solely within the territorial boundaries of Japan. It involved acts in both the United States and Japan by defendants and their confederates and also caused serious damage in the United States. The sovereignty of Japan is in no way implicated when alien corporations doing business here, and their local subsidiaries in the United States, unreasonably restrain trade and commerce here and otherwise violate the laws of the United States.

3. The Government of Japan suggests that this case involves only conduct undertaken "pursuant to the direction of the Japanese Government." (Brief at 2). Petitioners' course of conduct went far beyond the scope of any "directions" of MITI. MITI did not direct petitioners to fix prices in Japan. In fact, the *Fair Trade Commission of Japan* brought no fewer than three separate proceedings against these Japanese manufacturers for violation of the Japanese antimonopoly laws—proceedings that centered on some of the same concerted conduct that made up the overall course of conduct which respondents have challenged in this case. MITI also did not "direct" petitioners to dump in violation of United States statutes, or to lie about their actual import prices on United States customs entry documents, or to lie about their prices to the United States Treasury Department by submitting false responses in the 1921 Antidumping Act proceeding involving television receivers from Japan, or to collude concerning methods to conceal their actual prices and to make clandestine payments necessary to continue their dumping campaign in the United States. Indeed, as the Court of Appeals noted, there is record evidence that "would permit a finding that efforts were made to conceal this activity . . . from MITI." (179a).

The Government of Japan certainly did not direct defendants to lie to MITI about their actual prices on consumer electronic products imported and sold in the United States. It never "directed" them to lie to the Japanese tax

authorities or to pay Japanese taxes on the basis of prices they falsely reported to the Japanese tax authorities as the "actual" prices on sales to United States purchasers. It never "directed" them to conspire to supply false statistical data concerning the value of domestic and export shipments of these products to MITI and other Japanese governmental agencies to conceal their dumping, as the minutes of petitioners' "Statistics Committee" of the Electronic Industries Association of Japan show they did.³ Petitioners' clandestine payment scheme also involved wholesale violation of Japan's Foreign Exchange Control Law.

Petitioners did not comply with any "direction" from MITI in doing what they have done. They did not do what they claim to have been "directed" to do, and they committed other acts, as part of a broader scheme, that none of them can claim they were "directed" to do. The Government of Japan, like the United States Customs Service and the United States Treasury Department, was simply duped by these companies. Petitioners' belated effort to resurrect the "MITI note" issue, which they deliberately and explicitly chose not to press below,⁴ is nothing but a

3. As characterized by the court below, one such document "suggests that at [the December 26, 1966 meeting of the EIAJ Statistics Committee] the members of the committee agreed to modify their accounting practices so as to conceal from [Japanese] government agencies the extent of the disparity between export and domestic prices." (125a). Petitioners later contended unsuccessfully below that this document, consisting of notes of the meeting, was inadmissible in evidence because it was not shown to be "authentic," although they produced it from their own files in discovery.

4. At oral argument in the Court of Appeals below, petitioners' liaison counsel, Mr. Zoeller, made it clear that defendants "[did] not press it on this appeal":

[Plaintiffs' counsel] points to these check price agreements about which I think your Honors know very well, we like to refer to them as government mandated export agreements because of the record that has been developed down below about MITI [the Ministry of] [I]nternational [T]rade and

sham. See, e.g., *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962); *Loewe v. Lawlor*, 208 U.S. 274, 299 (1908). The Court of Appeals correctly held that factual issues concerning petitioners' *actual* course of conduct precluded summary judgment. The Government of Japan cannot and does not claim for these petitioners an immunity for overall unlawful conduct which is not recognized under United States law.

CONCLUSION

The Government of Japan seeks to raise a false issue not even pressed below by petitioners. The brief of the Government of Japan raises no new or sufficient reason for granting the petition.⁵ The Court of Appeals in this case gave due consideration to the 1975 note in the record below. For compelling reasons unrelated to its content, the Court of Appeals for the Third Circuit unanimously ruled that summary judgment clearly could not be granted on this ground. Further review is thus unnecessary. The legal

NOTE — (Continued)

[I]ndustry having required it but whether they did or not is obviously of no importance on this appeal and *we do not press it on this appeal* because the fact is that the plaintiffs cannot show they were in any respect injured . . ." (Transcript of Oral Argument Before The Court of Appeals for the Third Circuit on October 22, 1982, at 88-89.)

5. The suggestion at footnote 2 of the Brief that the Court "may wish to request the views of the United States concerning the questions discussed" in the *amicus* brief can thus be put to one side. Since the questions discussed in the *amicus* brief are not genuinely presented in this case, the views of the United States could add nothing to this Court's consideration of these irrelevant questions. Moreover, the Government of Japan in the Note Verbale dated May 29, 1984, requested the Government of the United States to file an *amicus curiae* brief before the Court to reflect the views of the Government of Japan. See *Appendix to Brief of Government of Japan*, at 1a-4a.

issue sought to be raised was not reached below. It will probably never be reached in this case, which is still at the interlocutory, pretrial stage. Final disposition should await the development of a complete factual record at trial and the determination of all the legal and factual questions in the lower courts.

Respectfully submitted,

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